

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1251

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

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REA EXPRESS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

and

AIR EXPRESS INTERNATIONAL CORPORATION,

Intervenor.
-----x

Docket No.
74-1251

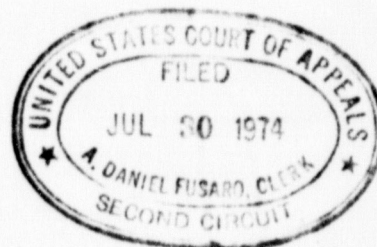
REPLY BRIEF OF PETITIONER REA EXPRESS, INC.

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Dated: July 30, 1974



REA EXPRESS, INC.,
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In its brief, the CAB places much reliance on its discretion to refuse to institute investigations. It also discusses the decision at issue and submits substantial misstatements of the submissions made to the CAB by REA.

In view of the CAB's reliance on its discretion, it is important to emphasize the grounds of the CAB's decision. The CAB refused to hold hearings on REA's complaints because "REA's showing simply does not convince us that respondents' use of the words 'air express' in their corporate or trade names has caused, or is likely to cause,

public confusion of sufficient substance to warrant commitment of the Board's staff and time resources to a formal proceeding." (66(a)-67(a)) In reaching this finding, the CAB (1) failed to accept as true the factual allegations in REA's complaints and (2) failed to give weight to the only evidence of record. The CAB did not fail to find an investigation to be in the public interest based on regulatory criteria other than the facts presented to it, but only because it was not "convinced" by REA's showing. This attitude by the CAB misconceives its proper role in evaluating the factual allegations presented by a complaint.

In refusing to institute a proceeding after a complaint has been filed, the CAB makes "a ruling tantamount to a court's order sustaining a demurrer to a petition or complaint." Pan-American Grace Airways v. Civil Aeronautics Board, 178 F. 2d 34, 36 (D.C. Cir. 1949). Nothing is clearer in the law than the proposition that on a demurrer, the material allegations of a complaint are taken as true. Cruz v. Beto, 405 U.S. 319 (1974); Drachman v. Harvey, 453 F. 2d 722 (2d Cir. 1974); Dacey v. New York County Lawyers Association, 423 F. 2d 188 (2d Cir. 1969), cert. den. 398 U.S. 929 (1974); Build of Buffalo, Inc. v. Sedita, 441 F.

2d 284 (2d Cir, 1971). Moreover,

"Adjudicative facts - facts pertaining to a particular party - normally ought not to be found without allowing the party a chance to rebut, explain, and cross-examine" 1 K. Davis, Administrative Law Treatise 506 (1950).

The subject of REA's complaint clearly involved adjudicative facts, i.e., facts involving acts of the parties to this proceeding. It also directly affects their property rights, i.e., the use of their names. Therefore, denial of an investigation based on the CAB's refusal to accept the facts stated in REA's complaint as true is reversible error.*

In its amended complaint REA stated that the use of the name "Air Express" is both inherently likely to

*The statement of U. S. Supreme Court in American Airlines, Inc. v. North American Airlines, Inc. 351 U. S. 79, 83 (1956) that "consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair" does not dispose of the question raised herein. In that case, the CAB had in fact instituted an investigation, and so the issue of whether it must accept the allegations made in a complaint filed by a party before the agency was not raised. Moreover, the FTC cases cited by the Supreme Court are completely inapposite; no comparable procedure for complaints filed by parties before the agency is provided for in the Federal Trade Commission Act. Thus, while a finding of public interest may be a jurisdictional prerequisite to the CAB's institution of a proceeding, an investigation can not be denied on the basis of considerations relied on by the CAB which are inconsistent with the factual allegations stated in the complaint.

confuse Air Express customers of REA (3(a)-4(a), 7(a)) and has resulted in actual confusion on the part of the shipping public (40(a)). Attached to its amended complaint, REA submitted an affidavit to show the substantial and specific nature of the actual confusion (41(a)-48(a)). Yet the Board did not accept the truth of these allegations, saying merely that it was "not convinced." Credibility determinations are the function of a hearing, not the basis on which a complaint may be dismissed or disregarded. This action clearly violated the Board's duty, in the absence of further investigation, to accept the facts as stated by REA in its complaint. It also involved a failure to decide the issues before it on the basis of any substantial evidence as argued in REA's main brief.

What was REA's showing of widespread shipper confusion which was deemed unconvincing by the CAB? The CAB misleadingly states in its brief that REA presented only 10 specific instances of confusion. "Of these, 6 included the name and address of the shippers involved and 3 included the waybill numbers of their shipments." (p. 17) In fact, a careful perusal of the affidavit will show 21 instances of confusion*

*Of these, 6 included the name and city of the shipper, 6 included the name of the shipper, 4 included the name and street address of the shipper, 1 included the name, city, and waybill number, 1 included the name, address and waybill number, and 1 included the waybill number.

It would have been easy for the CAB to trace all of these complainants -- nearly all of them were substantial companies whose street address could be found in a phone directory. Obviously, waybill numbers would not be supplied in every case since many of the shippers failed to send shipments on REA because they were confused, and did not have REA waybill numbers.

The CAB in its brief then proceeded to cite three additional instances of confusion cited by REA. All three provide strong evidence of general public confusion. Thus, if the New Jersey Telephone Company's internal listings were confused, information operators gave out incorrect information to shippers, who in turn will be confused; the confusion of airline customer service personnel directly causes confusion of shippers they deal with; and DAX's successful attempt to get business away from REA by making use of the name confusion clearly indicates that the respondents took advantage of widespread confusion.

Finally, REA presented statements that its terminals received "3 inquiries daily" or "several phone calls a month" from confused customers. (44(a)-45(a)) Certainly these inquiries were evidence that substantial and widespread

public confusion existed, whether or not the shippers involved were named.

At no place in its order did the CAB explain why these specific statements did not "convince" it. Instead, it stated that "the affidavit is general in nature, setting fourth, for the most part, broad conclusions. It is singularly lacking in specifics." (66(a)) This statement is simply not true and therefore cannot form a valid basis for the CAB's action. What specifics would cause the CAB finally to take action are never revealed, and the whole attitude of the CAB toward the complaint is reminiscent of the intricacies of common law pleading.

Other than these misleading comments on REA's affidavit, the CAB relied in its opinion and its brief herein on the lack of evidence in its files and a priori reasoning to support its finding that REA's showing "does not convince us." The Board said in support of its behavior:

"The public always has been free to complain informally to the Board of service problems and has done so freely and frequently with respect to a wide variety of problems." (65(a)-67(a))

Unsophisticated shippers are not likely to complain that they are confused, especially since one who is confused

usually does not know it. The CAB may think that many shippers complain to it about their problems, but it has no way of knowing; the only way it can find out whether the information in its files represents the facts in the real world is by making an investigation. This is all that REA asked it to do.

Indeed, the CAB's reliance on ex parte information in its own files to support a finding on an adjudicative issue without giving REA an opportunity to contest the information is in itself a violation of due process. 2 K. Davis, Administrative Law Treatise 432 (1958); ICC v. Louisville & Nashville R.R., 227 U.S. 88 (1913); Kline v. United States, 41 F. Supp. 577 (D. Neb. 1941). REA has no way of knowing what records the CAB looked at to determine that it has no complaints. The hearing REA sought would have permitted REA to subject such matters to scrutiny, and denial of a hearing precludes REA from its due process rights.

The CAB also relied on the fact that REA failed to complain between 1969 and 1972 (p. 16) and failed to complain about misuse of the name "Air Express." However, the Board's own Director of Enforcement has admitted:

"An argument of estoppel will not work against the Board's safeguarding of the public interest under section 411." (27(a)).

The issue is not whether REA keeps up with the attempts of its competitors to confuse the public. The issue is whether the shipping public is confused. And the fact that the public may also have been confused in 1969 is by no means dispositive of whether it is also confused today.

Thus, in contrast to the specific information produced by REA, the CAB falls back on hopeful speculations that it would be informed by the shippers if there was a problem, and an a priori assumption that Air Express is a common name and cannot be confusing.

CONCLUSION

This Court must review the CAB's action on the basis that the factual allegations in the complaint and affidavits submitted by REA are true. The Board's order should be reversed and remanded.

Respectfully submitted,

Peter G. Wolfe

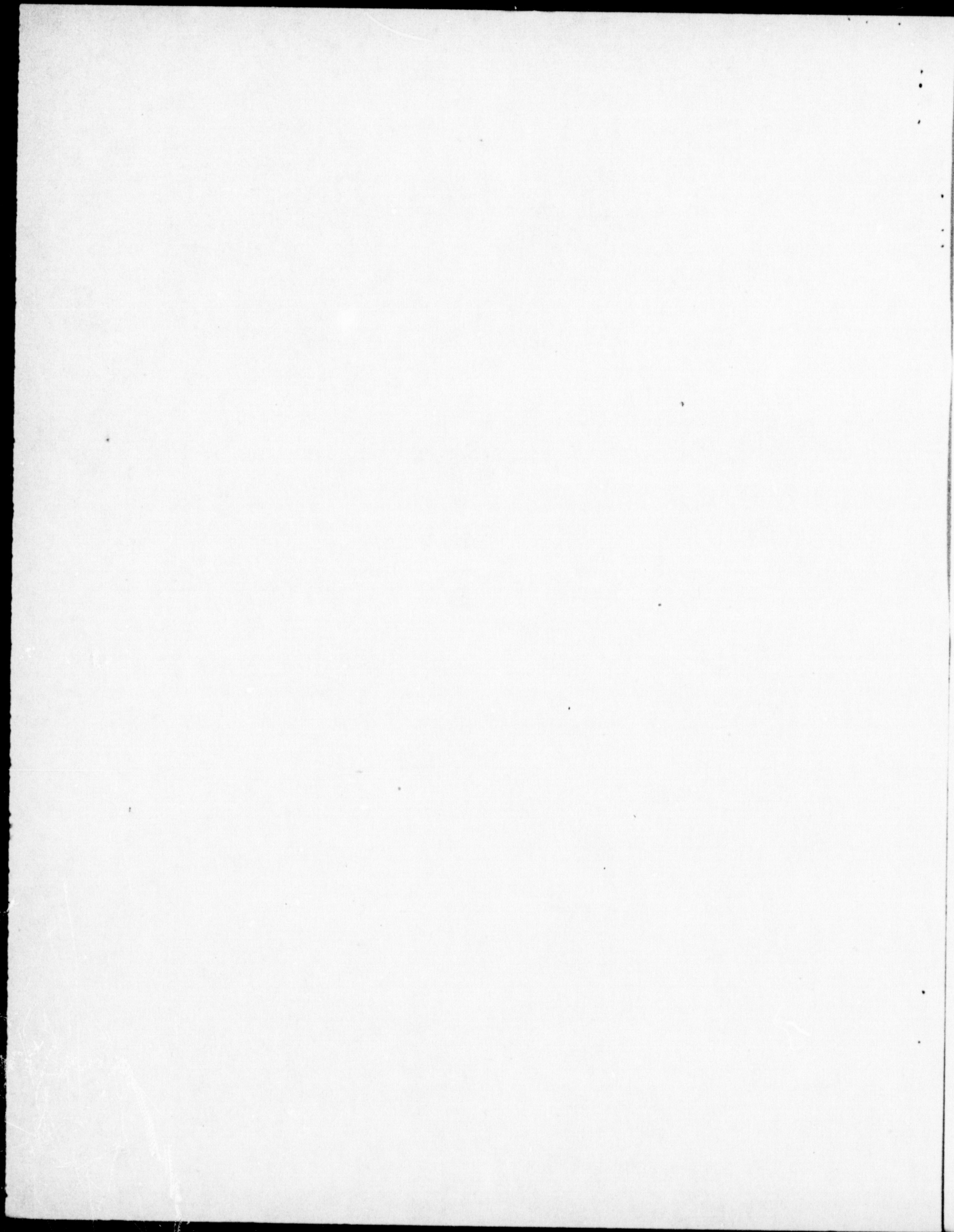
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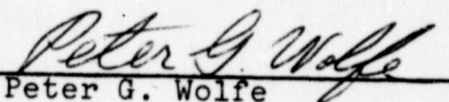
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed copies
of the Reply Brief of Petitioner REA Express, Inc. to the
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